IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-1557

NACHMAN CORPORATION,
Petitioner,
v.
PENSION BENEFIT GUARANTY CORPORATION,
and
INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA (UAW),
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF IN OPPOSITION FOR UAW

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The International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW), by counsel, respectfully pray that the Court *deny* the Petition for Writ of Certiorari.

OPINION BELOW

The opinion below, authored by Judge Sprecher, with Cummings and Wisdom, J.J.,[1] on the panel, is reported at: *Nachman Corp.* v. *PBGC & UAW*, 592 F.2d 947 (7th Cir. 1979), *reversing* 436 F. Supp. 1334 (N.S. Ill. 1977). (A 1-29).[2]

COUNTERSTATEMENT OF QUESTIONS PRESENTED

1. A defined benefit pension plan is terminated after the September 2, 1974 effective date of the guaranty provisions of ERISA,[3] 29 U.S.C. § 1322, but before the January 1, 1976 effective date of the Act's minimum vesting rules, 29 U.S.C. § 1053. The retirement benefits are vested under the terms of the plan. However, the assets of the trust are insufficient to fund them fully. PBGC guarantees the benefits, finding them "nonforfeitable" within 29 U.S.C. § 1322, and asserts statutory liability against the employer under 29 U.S.C. § 1362.

In such a termination, does the plan's disclaimer, purporting to limit vested benefit rights to the assets in the fund, render the rights not "nonforfeitable" within 29 U.S.C. § 1322, and thus not subject to a PBGC guaranty?

2. If Nachman is liable to PBGC under 29 U.S.C. § 1362, does Title IV of ERISA contravene the Due Process Clause of the Fifth Amendment?

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[1] John Minor Wisdom, J., of the Fifth Circuit, sitting by designation.

[2] The decision below is reproduced in the Appendix to the Petition, cited in the style "A 1."

[3] Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. §§ 1001-1381 (1975). The relevant portions are reprinted in the Petition, at 3-5.

COUNTERSTATEMENT OF THE CASE

The Seventh Circuit's statement[4] is both succinct and accurate. For convenience, we paraphrase it here, rather than shear the argument from Nachman's version.

Pursuant to a labor agreement with the UAW, in 1960 Nachman established a pension plan for hourly employees at its facility in Chicago. The plan provided for vesting of benefits after employees fulfilled specified age and length-of-service requirements. It is conceded that the benefits in issue were vested under the terms of the plan. As is typical of a defined-benefit plan, Nachman was required to make annual contributions to a trust fund on an actuarial basis. Those contributions were calculated to include the administrative costs, benefit liabilities accruing during the current plan year ("normal costs"), and the amount necessary to amortize the past service liability over thirty years.[5] Nachman complied with the funding obligations of the plan.

The benefit guaranty provisions of Title IV of ERISA, 29 U.S.C. § 1322, became effective September 2, 1974. On December 31, 1975, after termination of the labor agreement, Nachman terminated the pension plan. The termination accompanied the closing of the plant, and is not challenged. On January 1, 1976, the minimum vesting rules of 29 U.S.C. § 1053 would have applied to this plan.

The assets in the trust fund were insufficient to pay all the vested benefits which accrued before December 31, 1975. Those assets can provide only 35% of the accrued vested benefits. If not subject to the PBGC guaranty, the 135 retirees' benefits would be reduced ratably

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[4] 592 F.2d at 950 (A 2-3).

[5] The plan credited employees for years served prior to the establishment of the plan. "Past service liability" refers to the cost of paying monthly benefits for those years.

—from an average of $77.00 a month, to $27.00 a month.[6] Termination and (with it) the problem of insufficiency could have been avoided had Nachman "frozen" the plan, *i.e.*, maintained it by amortizing over the remainder of the funding cycle. Nachman chose, instead, to assert that Article V § 3 [7] of the plan foreclosed the PBGC guaranty under 29 U.S.C. § 1322, by making the benefit rights "forfeitable." PBGC can only guarantee and assert employer liability as a result of:

> nonforfeitable benefits (other than benefits becoming nonforfeitable solely on account of the termination of a plan) under the terms of a plan which terminates at a time when . . . this title applies to it. [29 U.S.C. § 1322(a), 592 F.2d at 951 (A 4)]

Nachman asked a declaration that ERISA would not guarantee, not impose liability on it for the vested, but unfunded, benefits. Nachman argued that, prior to the January 1, 1976 effective date of the minimum vesting rules, 29 U.S.C. § 1053, clauses like Article V § 3 could operate to make benefits conditional on adequate funding, and, thus, *not* "nonforfeitable." Even on Nachman's view, after that date, the minimum vesting rules would eliminate the argument by voiding such clauses.

The District Court adopted Nachman's reading, holding that Congress did not intend, until January 1, 1976, to subject employers to liability for unfunded benefits which they had disclaimed. The District Court did not reach the constitutional issue.

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[6] 592 F.2d 961 n.29 (A 24).

[7] "Benefits provided for herein shall be only such benefits as can be provided by the assets of the Fund. In the event of termination of th[e] Plan, there shall be no liability or obligation on the part of the company to make an further contribution to the Trustee except such contributions, if any, as on the effective date of such termination, may then be accrued but unpaid." 592 F.2d at 950 (A 3).

The Seventh Circuit reversed. Construing the definition of "nonforfeitable," [8] in light of the legislative history, the Court held that fully vested benefit rights satisfied the definition,[9] without regard to inadequacy of the funding. The disclaimer is irrelevant. Indeed, as the Seventh Circuit points out, "the purpose of Title IV was to guarantee benefits that might be lost because of employer liability disclaimers." 592 F.2d at 956 (A 14). The benefits are, then, subject to PBGC guaranty, and Nachman is liable under 29 U.S.C. § 1362, as a result.

The Seventh Circuit went on to hold that PBGC's construction of the Act does not contravene the Due Process Clause. It finds a clear congressional purpose in enacting Title IV of ERISA to protect employees from the loss of vested benefits due to insufficient funds. Even applying the Contract Clause analysis of *Allied Structural Steel Co.* v. *Spannus*, —— U.S. —— (1978), 98 S. Ct. 2716, 57 L.Ed.2d 727,[10] the Court below held that

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[8] § 1002(19): "The term 'nonforfeitable' when used with respect to a pension benefit or right means a claim obtained by a participant or his beneficiary to that part of an immediate or deferred benefit under a pension plan which arises from the participant's service, which is unconditional, and which is legally enforceable against the plan. . . ." (A 3).

[9] *See:* 592 F.2d at 953 (A 8-10), where the Circuit parces the § 1002(19) definition, making the essential distinction that the claims are enforceable *against the plan,* as the definition requires. They simply may not be collectible because of the state of the funding, absent PBGC guaranty. Nor are they conditional. The participants have met all the conditions required of them, *i.e.*, age and service. The claims are fully vested in "technical pension language."

[10] The UAW had argued that a stricter standard governed due process analysis under the Fifth Amendment, relying on *Duke Power Co.* v. *Carolina Environmental Study Group, Inc.*, 438 U.S. 59 (1978). The Seventh Circuit did not reach the issue of whether the Contract Clause and the Fifth Amendment impose identical, or different, restraints on legislative impairment of contracts. 592 F.2d at 959 (A 21). It used the analysis which, even in the UAW view, was most favorable to Nachman.

the imposition of retroactive liability was rationally related to the end. 592 F.2d at 958-963 (A 19-29). *Spannus* and *Alton*[11] are distinguished by the nature of the legislative findings, of the burden imposed, and of the equities and reliance interests involved. Title IV is, in addition, found to have careful limitations as to time, amount, circumstances and need—entirely absent in *Spannus*.

ARGUMENT

Title IV of ERISA has spawned a series of cases involving both statutory and constitutional issues, which are gradually working their way to decision at the Circuit level. This is the first full-fledged termination case to come to appellate decision.[12] It will certainly not be the last. There are three reasons why this is a poor vehicle for this Court to review such a new, complex statute:

First, this case involves, on Nachman's own reading, a "transitional" issue. Nachman, followed by the District Court, ties its statutory analysis to the happenstance that this plan terminated *between* September 2, 1974, and January 1, 1976. By its own terms, its argument "self-destructs" on the 1976 effective date of the minimum vesting rules. Title IV will, presumably, be applied well beyond that date. If the Court is to review this Act, it is only prudent to wait until transitional confusions have passed.

Second, the statutory issue here turns on a detailed, technical parcing of the definition in § 1002(19). The reading adopted is that of the administering agency. It

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[11] *Railroad Retirement Bd.* v. *Alton Railroad*, 295 U.S. 330 (1935).

[12] *Connolly* v. *PBGC*, 581 F.2d 729 (9th Cir. 1978), *cert. den.*, —— U.S. ——, 99 S.Ct. 1278 (1979), *reversing* 419 F. Supp. 737 (C.D. Calif. 1976), did not arise out of a termination, and joined a statutory issue not relevant here.

supports, rather than interrupts, the guaranty of retirement benefits—the goal of Congress. It is premature to assume that any split will develop among the Circuits as to the meaning of this definition. The First, Third and Sixth Circuits will shortly have this issue.[13] If and when the Circuits split, the Court will have ample opportunity to grant *certiorari*, and will have the benefit of an issue ripened by the appellate discussion. To be sure, the Second Circuit has construed § 1002(19) in a Title I context. *Riley* v. *MEBA Pension Trust*, 570 F.2d 406, 409-410 (2d Cir. 1977). But despite Nachman's contrary assertion,[14] Judge Friendly's analysis is that used by the Seventh Circuit here.[15] There is no split on the issue—there is agreement.[16]

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[13] *PBGC* v. *Ouimet Corp.*, —— F. Supp. —— (D. Mass. 1979), 233 B.P.R. D-1; *In Re: Matter of the Williamsport Milk Producers Co., Inc. Retirement Plan*, —— F. Supp. —— (M.D. Pa. 1978); 206 B.P.R. D-15; *A-T-O, Inc.* v. *PBGC*, 456 F. Supp. 545 (N.D. Oh. 1978); *Lear Siegler, Inc.* v. *PBGC & UAW*, —— F. Supp. —— (E.D. Mich. 1979); *Concord Control, Inc.* v. *PBGC & UAW*, —— F. Supp. —— (S.D. Oh. 1978); *DeFoe Shipbuilding* v. *PBGC*, —— F. Supp. —— (E.D. Mich. 1978), 178 B.P.R. D-15. *Williamsport Milk*, *A-T-O*, *Concord Control*, and *DeFoe* are currently on appeal. The rest will be shortly, we are informed.

[14] Petition at 17-18.

[15] *Riley* involved a forfeiture triggered by a plan provision penalizing a return to work in the industry. Riley claimed his benefits were "nonforfeitable" within § 1002(19), and thus protected against loss by the minimum vesting rules of § 1053. Riley claimed protection both before and after § 1053's January 1, 1976 effective date. The Second Circuit held that, despite the plan's provisions, the benefits were "nonforfeitable" within § 1002(19). Since Riley sued under § 1053, the Court went on to rule that, although his benefits were "nonforfeitable," he had no remedy under § 1053 prior to the January 1, 1976 effective date. He did have a remedy thereafter. 570 F.2d at 409-410, 413. Here, of course, § 1322 was effective on September 2, 1974. The analysis of § 1002(19) is unchanged, though.

[16] Nachman observes that the Seventh Circuit's decision conflicts with the District Court decision in *A-T-O* v. *PBGC*, 456 F. Supp. 545 (N.D. Oh. 1979). (Petition at 18). But, with due respect to the Northern District of Ohio, this falls well short of a Circuit split.

Third and last, the constitutional issue can await the development of further Circuit authority. The cases noted above will present the same constitutional issue to the other Circuits. A split may, or may not result. There is no need to plunge into the due process issue, particularly when it is posed in a "transitional" statutory setting. The Seventh Circuit did not rest its constitutional analysis on any asserted distinction between the Fifth Amendment and Contract Clause analysis, despite the UAW's urgings. 592 F.2d at 959 (A 21).[17] Instead, it took this Court's approach in *Spannus*, and applied it in a restrained, detailed fashion—noting, as this Court has, the marked difference between ERISA and state legislation. Time will bear out (or erase) the asserted distinctions, giving a detailed background against which the Court can better judge the rationality of the means which Congress chose in Title IV.

CONCLUSION

For the foregoing reasons, the Court should *deny* the petition.

Respectfully submitted,

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[17] *See* above, n.10.